Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LINDA EKSTROM STANLEY,
ELLEN B. VERGOS, PETITIONERS

v.

DEPARTMENT OF JUSTICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Attorney General has the power to remove employees solely due to change in presidential administrations without notice and hearing and without complying with the Civil Service Due Process Amendments of 1990, 5 U.S.C. 7511, et seq.

II. Whether 28 U.S.C. 581, the statute governing the appointment, term of office and removal of the U.S. Trustee, is a statute excepting the U.S. Trustee position from the competitive service within the meaning of the Civil Service Due Process Amendments, 5 U.S.C. 7511(b)(2)(C).

III. Whether the Attorney General has the power to remove, without cause, quasi-judicial officers who are appointed to serve a fixed statutory term prior to expiration of their terms without regard to the separation of powers principles articulated by this Court in Humphrey's Executor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 30

APPENDIX

Decision of the United States Court of Appeals for the Federal Circuit 1a

MSPB Opinion (Vergos) 9a

MSPB Opinion (Stanley) 12a

Order of the United States Court of Appeals for the Federal Circuit denying Rehearing (Stanley) 15a

Order of the United States Court of Appeals for the Federal Circuit denying Rehearing (Vergos) 17a

MSPB Initial Decision (Stanley) 19a

MSPB Initial Decision (Vergos) 42a

Relevant Provisions Involved.....50a

TABLE OF AUTHORITIES

Page

CASES

AMENDOLA V. DEPARTMENT OF HEALTH & HUMAN SERVICES, 989 F.2D 1180, 1182 (FED. CIR. 1993).....16

BALSER V. UST, 327 F. 3D 903 (9TH CIR. 2003), CERT. DENIED, 124 S.CT. 2159 (2004).....19, 20

COLE V. YOUNG, 351 U.S. 536, 546 (1956).....25

COOPER INDUSTRIES, INC. V. AVIALL SERVICES, INC., 125 S. CT. 577, 584 (2004).....30

DEP'T OF THE NAVY V. EGAN, 484 U.S. 518 (1988).....25

EX PARTE HENNEN, 38 U.S. (13 PET.) 230, 259 (1839)9

GOSNELL V. MSPB, 69 F.3D 1138 (FED CIR. 1995)..... 6, 13, 18

HENNEN, 38 U.S. (13 PET.) 230, 259 (1839).....9

HUMPHREY'S EX'R V. UNITED STATES, 295 U.S. 602 (1935)...23

IN RE CASTILLO, 297 F.3D 940, 950 (9TH CIR. 2002).....19

IN RE REVCO D.S., INC., 898 F.2D 498, 500 (6TH CIR. 1990) .19

JOELSON V. U.S., 86 F.3D 1413 (6TH CIR. 1996).....19

KING V. BRIGGS, 83 F.3D 1384 (FED. CIR. 1996).....6, 13

LEATHERMAN V. TARRANT COUNTY NARCOTICS INTELLIGENCE & COORDINATION UNIT, 507 U.S. 163, 168 (1993).....15

MYERS V. UNITED STATES, 272 U.S. 52 (1926) 21, 22

PARSONS V. UNITED STATES, 167 U.S. 324 (1897) 6, 20

RICHMAN V. STRALEY, 48 F.3D 1139 (10TH CIR. 1995) 19

STANLEY V. DEP'T OF JUSTICE, 2002 WESTLAW 31966394 1

THOMPSON V. DOJ, 61 M.S.P.R. 364 (1994), AFF'D, 106 F.3D 426 (FED. CIR.1997) 11

TODD V. MSPB, 55 F.3D 1574 (FED. CIR. 1995) 6, 13

UNITED STATES V. FAUSTO, 484 U.S. 439 (1988) 29

UNITED STATES V. PERKINS,116 U.S. 483 (1886) 21

VAN WERSCH V. DEP'T OF HEALTH & HUMAN SERVICES, 197 F.3D 1144 (FED. CIR. 1999) 6, 13

VERGOS V. DEP'T OF JUSTICE, 2003 WESTLAW 21417091 1

WIENER V. UNITED STATES, 357 U.S. 349 (1958) 23, 24

WINDSOR V. UNITED STATES DEPARTMENT OF JUSTICE, 746 F.2D 6 (6TH CIR. 1984) 18

STATUTES

5 USC 2101 27

5 USC 2102 27

5 USC 2102(a) 27

5 USC 7511 ..... *passim*

5 USC 7511(a) 11

5 USC 7511(a)(1)(C) 10, 16

5 USC 7511(b) 12

5 USC 7511(b)(2)(C) ..... *passim*

5 USC 7512 ..... 13, 14, 15, 16

5 U.S.C 7701(a) 3, 7

5 USC 7703 7

5 USC 7703(a)(1) 7

20 USC 241(a) 13

28 USC 536 27

28 USC 542(c) 15, 18

28 USC 581 ..... *passim*

28 USC 581(b) ..... *passim*

28 USC 581(c) ..... *passim*

28 USC 586(a) 19

28 USC 589 ..... 17, 27

28 USC 594 27

28 USC 1254(1) 1

29 USC 783(a)(1) 14

BANKRUPTCY JUDGES, UNITED STATES TRUSTEES, AND FAMILY FARMER BANKRUPTCY ACT OF 1986, PUB.L. NO. 99-554, 100 STAT. 3088 (1986) 9

H.R. CONF. REP. 99-958, H.R. Conf. Rep. No. 958, 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 5246, 1986 WL 32627 ..... 10, 17

H.R. REP. 101-328, H.R. Rep. No. 328, 101ST Cong., 1ST Sess. 1989, 1990 U.S.C.C.A.N. 695, 1989 WL 225002 ..... 8, 10

H.Rep. No. 595, 95th Cong. 88-99, 2d Sess. 404, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5963, 6049-60 9

OTHER AUTHORITIES

ROBERT G. VAUGHN, FEDERAL EMPLOYMENT DECISIONS OF THE FEDERAL CIRCUIT, 36 AM. U.L.REV. 825, 859 (1987). 7

WALTER DELLINGER, THE CONSTITUTIONAL SEPARATION OF POWERS BETWEEN THE PRESIDENT AND CONGRESS, 63 SPG LAW & CONTEMP. PROBLEMS 513, 556 (WINTER/SPRING 2000). 9

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (1a-6a) is published at 423 F.3d 1271. The initial decision of the administrative judge in Petitioner Stanley's case granting respondent's motion to dismiss (19a-41a), dated December 16, 2002, is unpublished and reported at 2002 Westlaw 31966394. The decision of the Merit Systems Protection Board affirming the initial decision is unpublished (12a-14a) and cited as Stanley v. Dep't of Justice, SF-0752-02-0591-I-1 (MSPB Mar. 18, 2004). The initial decision of the administrative judge in Petitioner Vergos' case granting respondent's motion to dismiss (42a-48a), dated June 6, 2003, is unpublished and reported at 2003 Westlaw 21417091. The decision of the Merit Systems Protection Board affirming the initial decision is unpublished (9a-11a) and cited as Vergos v. Dep't of Justice, AT-0752-03-0372-I-1 (MSPB July 1, 2004).

JURISDICTION

Judgment of the United States Court of Appeals for the Federal Circuit was entered on September 9, 2005, (1a-6a) and the order denying panel rehearing and rehearing *en banc* issued on November 17, 2005. (15a-16a [Stanley] and 17a-18a [Vergos]). Upon Petitioners' application, the time for filing the petition for certiorari was extended to March 17, 2006. This Court has jurisdiction pursuant to 28 USC 1254(1).

RELEVANT PROVISIONS INVOLVED

The key relevant statutes are the Civil Service Due Process Amendments of 1990, 5 USC 7511-7514, in Pet. App. 50a-54a, and 28 USC 581, in Pet. App. 57a-59a.

STATEMENT

Petitioners allege that the Department of Justice ("DOJ") violated their rights to due process under the Civil Service Due Process Amendments of 1990, 5 USC 7511, *et*

seq.,[1] ("1990 DPA") when then Attorney General ("AG") Ashcroft removed them from office, without cause and without due process, prior to the expiration of their respective statutory terms of office under 28 USC 581(b).[2] The United States Court of Appeals for the Federal Circuit ("CAFC") affirmed the judgments of the Merit Systems Protection Board ("MSPB") dismissing their respective appeals for lack of jurisdiction.

Petitioners submit that CAFC case law on the dispositive issue of subject matter jurisdiction of federal employee appeals is unclear and inconsistent and ask this Court to grant certiorari to provide direction and clarity on the analytical framework used to determine this important issue. Federal employees are entitled to clear guidance as to applicable law governing their legal rights under the 1990 DPA.

Proceedings below

Petitioners, United States Trustees ("USTs") were each removed from office, without cause and without due process of law, before the expiration of their terms of office, by then AG Ashcroft in 2002 (Stanley) and 2003 (Vergos). They appealed their removals to the MSPB under the jurisdiction of the 1990 DPA. An "employee" entitled to appeal a removal from office is defined in the 1990 DPA to include "employees in the excepted service (other than a preference eligible)...who has completed 2 years of current continuous service in the same or similar positions in an Executive agency...."[3] Petitioners met the requirements of that definition. They sought an award of back pay and benefits for the unexpired portions of their terms, interest, attorneys' fees, costs and additional relief.

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[1] The 1990 DPA are set forth in Pet. App. 50a-54a.

[2] The statutes governing the office of the UST are set forth in Pet. App. 57a-66a.

[3] 5 USC 7511(a)(1)(C)(ii). (Pet. App. 50a).

The DOJ moved to dismiss for lack of jurisdiction, arguing that Petitioners were excluded from the definition of "employee" by an exception in the 1990 DPA at 5 USC 7511(b)(2)(C) (Pet. App. 51a) because former AG Reno proclaimed the USTs to be in a position of "confidential, policy-determining, policy-making or policy-advocating" character and because their position was "excepted from the competitive service by statute." The statute cited was 28 USC 581, the statute authorizing the appointment, term of office and removal of the UST. (Pet. App.57a-59a).

Both administrative judges, without factual hearings, dismissed Petitioners' respective appeals (Pet. App. 19a-41a, 42a-48a); each petitioner timely appealed to the MSPB; and the MSPB summarily affirmed the decisions of each administrative judge (Pet. App. 15a-15b, 16a-16b). Each Petitioner timely appealed to the CAFC where the decisions of the MSPB were affirmed in a single opinion. (Pet. App 1a-6a).

Statement of the case

Petitioners are lawyers appointed to two successive five-year terms as USTs in the DOJ by former AG Janet Reno. Both were removed from office, without cause and without due process, after eight years of continuous service, approximately two years before the expiration of their second terms of office by former AG John Ashcroft due to a "change in presidential administrations." (Pet. App 3a). The removals did not take place until June, 2002 (Stanley) and January, 2003 (Vergos) long after the new administration had taken office. No other USTs were removed before the expiration of their terms of office.

The DOJ did not comply with the due process procedures set forth in the 1990 DPA. As employees in the excepted service with more than two years of current continuous service, Petitioners were entitled to due process and appeal rights.[4]

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[4] 5 U.S.C 7701(a) (Pet. App. 54a-55a); and 7513. (Pet. App. 53a)

This petition presents the legal question of whether the MSPB has jurisdiction over the appeal of a UST removed from office, without due process, and without regard to the statutory term of the UST.[5] As in each case involving the scope of jurisdiction of the 1990 DPA, the resolution of the jurisdictional issue depends upon the statutory construction of the jurisdictional statute and of the statute authorizing and governing the employment of the aggrieved employee. The two statutes to be analyzed in this case are the 1990 DPA and 28 USC 581 providing for the appointment, removal and term of office for USTs.

The jurisdictional statute at issue is 5 USC 7511, *et seq*. (Pet. App. 50a, et seq.) It is a part of the 1990 DPA and defines an "employee" entitled to appeal a removal from office in subsection (a). It is an undisputed fact that Petitioners were employees with appeal rights under 5 USC 7511(a)(1)(C)(ii). (Pet. App. 2a). An employee in the excepted service entitled to due process and appeal rights is defined by 5 USC 7511(a)(1)(C)(ii) to mean an employee who has completed two years of current continuous service in the same or similar position in an executive agency under other than a temporary appointment limited to two years or less. Petitioners met the statutory definition of "employee."

The disputed issue is whether the position of UST was placed in the excepted service by statute so as to exclude the position from the protections of the 1990 DPA. The exclusions from the definition of employee are in subsection (b) of 5 USC 7511. Pursuant to 5 USC 7511(b)(2)(C), the head of an agency such as the AG may determine a position to be of "confidential, policy-determining, policy-making, or policy-advocating" character if the position is excepted from the competitive service by statute. AG Reno, in 1996, proclaimed the position of UST to be of the character described. The DOJ, the MSPB and the CAFC contend that 28 USC 581(c), providing that the AG may remove a UST, is

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[5] The term of office is set forth in 28 USC 581(b). (Pet. App. 59a)